United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROS., ET AL., NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
CBS INC., NO. 75-4036

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WARNER BROS., INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,

Intervenors.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER AND INTERVENOR CBS INC.

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March 5, 1975

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ON PETITIONS FOR REVIEW OF AN ORDER OF
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REPLY BRIEF OF PETITIONER AND INTERVENOR CBS INC.

The position of the Federal Communications Commission ("Commission") is self-contradictory. Its brief argues that PTAR III is a justifiable exercise of an asserted power of the Commission to regulate program content, yet at the same time it disclaims any intention to exercise that power in PTAR III. But while attempting to rely on the Commis-

sion's recent Report to the Congress On The Broadcast of Violent, Indecent, and Obscene Material,*/ the Brief surprisingly ignores the direct and irreconcilable conflict between the Commission's position as expressed in that document and in the Second Report and Order under review. In its Report to Congress, the Commission specifically declined to fashion rules relating to programs which might be deemed inappropriate for children, since such judgments by the Commission would be necessarily subjective and would raise substantial constitutional questions. The Report states, at page 2:

> "With respect to the broader question of what is appropriate for viewing by children, the Commission is of the view that industry self-regulation is preferable to the adoption of rigid governmental standards. We believe that this is the case for two principal reasons: (1) the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and (2) judgments concerning the suitability of particular types of programs for children are highly subjective." (Emphasis supplied.)

In its brief, the Commission tries to justify exercises of power of the same kind it solemnly disclaimed in its Report to Congress only 12 days earlier.

The response of the Commission, and of the Intervenors American Broadcasting Companies, Inc. ("ABC") and National Broadcasting Company, Inc. ("NBC"), to the

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*/ FCC 75-202, February 19, 1975.

serious constitutional issues presented by this appeal is in other respects entirely inadequate:

First, the principal response of the Commission and ABC and NBC to the argument that the exemptions constitute impermissible regulation of program content is that the exemptions are permissive with respect to programs the Commission likes rather than prohibitory of programs the Commission does not like. Thus, the Commission's Brief states, at page 41:

> "Neither the failure to adopt the prime time access rule in the first instance, nor its subsequent repeal would leave in effect any governmental edict restraining speech. A fortiori, the relaxation of a constitutionally permissible restraint would not itself raise a relevent First Amendment issue."

Such an argument, we believe, is absurd on its face. The Commission has here sought selectively to exclude programs from the access period on the basis of content.*/ It matters not that its rule is phrased in terms of permission to carry favored network programs, for the effect is to exclude disfavored network programs. The approach adopted by the Commission was rejected in Police Department of the

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*/ The Commission's Brief appears to concede that PTAR III represents a significant incursion into program content and licensee judgments. Indeed, it relies on the assertion that the "traditionally-accepted view is that [the scarcity of spectrum space] has justified more extensive intrusion into speech than would be permissible in other media." (Commission Brief at 48-49.) Whatever the constitutional differences between broadcast and the print media, it is clear that the Commission has no authority to regulate program content. See CBS Brief, pp. 22-40.

City of Chicago v. Mosley, 408 U.S. 92 (1972) where Chicago's attempt to regulate the content of speech by a similar exemption device was struck down by the Court. */ That the government may not regulate the content of speech by selective exemptions from an otherwise valid prohibition has been too well settled to require extensive comment. As the Supreme Court said in invalidating a statute denying a tax benefit to persons refusing to sign a loyalty oath:

> "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech . . . . The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech." Speiser v. Randall, 357 U.S. 513, 518 (1958). **/

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*/ Contrary to the suggestion of the Commission in its brief, Mosley did not authorize governmental agencies to select among persons desiring to speak on the basis of what they wanted to say. (See Commission's Brief at 48.) The Court in Mosley merely recognized that selections may be made among picketers on content-neutral gounds, and that even there "justifications for selective exclusions from a public forum must be carefully scrutinized." 408 U.S. at 98-99. The Commission, however, overlooked the central holding of Mosley that:

> "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." 408 U.S. at 96.

**/ See also Sherbert v. Verner, 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."

Second, while the briefs supporting the Second Report and Order contain broad assertions concerning the authority of the Commission under the First Amendment to regulate broadcasting, they scarcely acknowledge the firmly established constitutional limitations on the power to regulate the content of programming, articulated most recently by the Supreme Court in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). They also fail wholly to come to grips with the language of the Second Report and Order, which refers to the merit or "value" of specific programs */ -- by the Commission's own lights (¶¶ 30, 31 (n.25), 33) -- and which cautions licensees against presenting other, unnamed programs whose broadcast the Commission would regard as "abuses" of the exemptions (¶¶ 31, 34, 64). **/

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*/ The Supreme Court has exercised great restraint in not assigning "to the conscience of judges" the determination of "which publications address issues of 'general or public interest' and which do not . . . ." Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). The Commission should be required to exercise a similar restraint in passing judgment on the desirability of the content of programs.

**/ Significantly, the Commission sought to reassure those who object to any network programming in the access period that the Commission, by close supervision of exempt programs, would restrict such programming:

> "The changes adopted herein constitute less of an incursion into available access time (particularly in light of our admonition of network and licensee restraint) than would have occurred under PTAR II." (Emphasis supplied.) Second Report and Order, ¶ 64.

Finally, while the Commission and NBC point out that CBS has in the past sought exemptions from the prime time access rule for news and public affairs broadcasts,*/ they fail to recognize two salient points. First, CBS has consistently noted the First Amendment problems associated with any exemption from the prime time access rule and has specifically opposed an exemption for children's programs on that ground.**/ Second, what CBS in the past has favored is a limited exemption for news and public affairs, which the Supreme Court has recognized in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 394-95 (1969), lie at the heart of the First Amendment, and not discriminatory exemptions of the type included in PTAR III. Thus, PTAR III does not exempt all news broadcasts, but rather exempts public affairs broadcasts, documentaries (defined as certain programs which are non-fictional, educational or informational), and children's programs (defined as "programs primarily designed for children ages 2 through 12").***/ Moreover, CBS has never favored a scheme in which the Commission would be

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*/ Commission's Brief at 57, NBC Brief at 8.

**/ See, e.g., Oral Argument in FCC Docket No. 19622, Transcript at 320, 326-27 (July 31, 1973).

***/ The perils of this approach are exemplified by the Commission's ex cathedra pronouncement that Wonderful World of Disney is the only current network prime time offering that meets the rule's vague and subjective definition. Second Report and Order, ¶ 31, n.25.

involved in the day-to-day interpretation of its rule, making judgments between favored and disfavored programming. It is this selective and dangerous regulatory approach which clearly renders PTAR III unconstitutional.*/

Respectfully submitted,

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*/ Indeed, as CBS noted in its opening brief:

> "In view of the manifest intention of the Commission to become so involved in licensees' programming judgments, this Court need not reach the question whether the Commission could constitutionally adopt narrowly confined exceptions from the prime time access rule based on categories of program content." Brief of CBS at 27, n.28.

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STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

CHRISTOPHER A. WILBURN, being duly sworn, deposes and says:

Deponent is over the age of 18 years, is not a party to this action and resides at 1465 79th Street, Brooklyn, New York.

On the 5th day of March 1975, deponent served the annexed Reply Brief of Petitioner and Intervenor CBS Inc., upon each of the attorneys on the attached list by depositing true

copies of the same secure[illegible] enclosed in post paid, properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Christopher A. Wilburn

Sworn to before me this)
)
5th day of March 1975.)

Ralph M Dionne
Notary Public

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Notary Public, State of New York
No. 41-6042070
Qualified in Queens County
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